Supreme Court U.S.
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No. 80-714

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

~~STATE OF COLORADO;~~ JEFFERSON COUNTY, COLORADO; BOARD OF COUNTY COMMISSIONERS OF JEFFERSON COUNTY, COLORADO; and DAVID R. BRADEN, COUNTY ASSESSOR, JEFFERSON COUNTY, COLORADO, et al

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JURISDICTIONAL STATEMENT

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OCTOBER 27, 1980

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STATE OF COLORADO; JEFFERSON COUNTY, COLORADO; BOARD OF COUNTY COMMISSIONERS OF JEFFERSON COUNTY, COLORADO; and DAVID R. BRADEN, COUNTY ASSESSOR, JEFFERSON COUNTY, COLORADO,

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JURISDICTIONAL STATEMENT

QUESTION PRESENTED

Whether a Colorado ad valorem tax on a private contractor's use for profit of federally owned tax-exempt real and personal property, as measured by the fair market value of the exempt property, is unconstitutional as an infringement of the United States' immunity from state and local taxation provided by the Supremacy Clause of the Constitution.

OPINIONS BELOW

The Memorandum Opinion and Order and Declaratory Judgment of the Federal District Court (CA No. 76 M 1189) is reported at 460 F. Supp. 1184.

The Opinion of the United States Court of Appeals for the Tenth Circuit (No. 79-1193) is not yet reported.

JURISDICTION

The Opinion of the United States Court of Appeals for the Tenth Circuit (No. 79-1193) affirming the decision of the United States Federal District Court for the District of Colorado was entered

July 25, 1980. A Petition for Rehearing was filed by the Defendants-Appellants, State of Colorado, County of Jefferson, et al., on August 8, 1980. The Petition was denied by Order dated September 3, 1980 and the Mandate was thereafter entered on September 11, 1980. The Appellants then filed a "Petition for an Order to Recall Mandate and Stay the Mandate Pending Certiorari Review" on grounds that Appellants were not advised of the Order denying Appellants' Petition for Rehearing until after September 11, 1980. By Order dated October 1, 1980, the Tenth Circuit recalled the Mandate and stayed it to and including November 1, 1980 pending the filing by Appellants of a Petition for Writ of Certiorari. If Certiorari is granted, the Mandate will be further stayed until the case is decided. (Appendix p.32). In researching the rules and statutes on federal juristiction, Appellants found what they believe to be a statutory basis for a right of review by appeal of the Tenth Circuit's decision in this Court and so have now filed in the Tenth Circuit a Notice of Appeal and

Petition for Further Stay of Mandate Pending Appeal. The latter has not been acted upon by the Tenth Circuit as of the date this Jurisdictional Statement was written.

The jurisdiction of the Court to review by appeal a judgment of the United States Court of Appeals declaring a state statute unconstitutional is conferred by 28 U.S.C. Section 1254 (2). Detroit v. Murray Corporation, 355 U.S. 489 (1958).

STATUTORY PROVISIONS

The verbatim text of Section 39-3-112, CRS 1973, as amended, is set forth in the Appendix hereto.

STATEMENT OF THE CASE

In 1951 the Appellee United States of America (hereinafter United States) through the Atomic Energy Commission ((AEC), later Energy Research and Development Administration (ERDA) and presently the Department of Energy (DOE), acquired approximately two thousand five hundred (2,500) acres of land in Jefferson County, Colorado, as the site for certain production facilities with related buildings and structures which

came to be known as the Rocky Flats Plant. An additional four thousand (4,000) acres of land was acquired in 1974-1975 bringing the total land removed from the Jefferson County tax rolls to six thousand five hundred (6,500) acres. The production facilities with related structures were expanded over the years. (R.354,471). At all times relevant to this lawsuit, the Rocky Flats Plant has consisted of approximately six thousand five hundred (6,500) acres of land and approximately ninety-five buildings and structures. Id.

The production of triggers for nuclear weapons for national defense has always been the primary mission of the Rocky Flats Plant. (R.355,471). While other incidental research, development and production functions have taken place there during the relevant time period, such activity has been carried on only to the extent that DOE has specifically directed it and provided appropriate government funds. Id.

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1. "R" references are to the Record on Appeal on file herein.

The operation and direct management of the Rocky Flats Plant have been accomplished through private companies under management contracts with AEC, ERDA and DOE. (R.356,472). The Dow Chemical Company (DOW) managed and operated the plant from July 1, 1952 through June 30, 1975. (R.356,472). Rockwell International (Rockwell) undertook that responsibility beginning on July 1, 1975, under a management contract (R.90-294) which, as modified, is now designated Contract EY76-C-04-3533 (hereinafter referred to as Contract 3533). (R.356,472).

In 1975 the Colorado General Assembly enacted a statute now known as Section 39-3-112, C.R.S. 1973, effective January 1, 1976. Subsection (4) of the statute was amended in 1976, effective for tax years beginning with 1976. (See Appendix pp. 36-38).

The Jefferson County tax assessor notified Rockwell by letter dated May 27, 1976, that it was the "user of exempt property" (the Rocky Flats Plant) within

the meaning of 39-3-112 and was liable for the tax on such use. The United States and DOE would not permit the county assessor to come on to the Rocky Flats Plant in order to value the buildings, land and equipment for assessment purposes for the year 1976. The United States, however, offered to provide to the county assessor its "book value" or actual costs of construction of each building and costs of acquisition of each piece of equipment in the year that the building was built or the equipment purchased by the United States. Thus, the county assessor was forced to use for assessment purposes and without adjustment, the United States' 1950's and later costs of construction and acquisition for many, if not most, buildings and equipment at Rocky Flats. The 1950's costs are a small fraction of the value of such buildings and equipment in terms of 1976 fair market value. Nonetheless, in a further attempt to give Rockwell every benefit of the doubt, the county assessor further valued for assessment only the three hundred fifty (350) acres

enclosed by a chain link fence out of the total of six thousand five hundred (6,500) acres constituting the Rocky Flats Plant on the theory that Rockwell used only that land enclosed by the fence, the other six thousand one hundred fifty (6,150) acres serving as a buffer zone. The total values were based on the following component values (R.378,474):

	MARKET VALUE ("Book Value")	ASSESSED VALUE
Land (350 acres at $5,000.00 per acre)	$ 1,750,000.00	$ 552,000.00
Improvements	125,506,215.00	38,651,860.00
Machinery and Equipment	73,531,736.00	22,059,520.00
TOTAL	$200,787,951.00	$ 61,263,380.00

Applying the certified mill levy of the various governmental entities to the assessed value set forth above, the county assessor for Jefferson County computed the tax due and owing by Rockwell for 1976 to be $4,632,246,69. (R.429-430,474).

Rockwell then began proceedings

through the statutory administrative process requesting an abatement of the tax bill (R.363,474) and was denied relief at each stage. For some unknown reason, Rockwell did not complete the administrative process by appealing the final administrative decision to the State District Court as provided by Colorado law. (R. 363-364).

Thereafter, the United States without joining Rockwell as a party, filed suit pursuant to 28 U.S.C. 1345 and 28 U.S.C. 2201 against the Appellants herein seeking a declaratory judgment declaring that the application of Section 39-3-112 to Rockwell's use of the Rocky Flats Plant based on the full value (AEC's "book value") of the plant to be (1) an unconstitutional taxation of property owned by the United States and (2) an unconstitutional discrimination against the United States and those with whom it deals. (R.10-11). The Court rendered an Opinion and Order on November 28, 1978, that the application of Section 39-3-112, as amended, to Rockwell was an unconstitutional tax on property

of the United States rather than a tax on Rockwell's use of that property. (R.470-478). In view of that holding, the Trial Court stated that it was not necessary to consider the United States' second claim that the tax in question unconstitutionally discriminated against the United States and those with whom it deals. (Appendix p.30).

The decision of the Federal District Court was appealed to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. 1291, and affirmed.

ARGUMENT

I. THE DECISION OF THE TENTH CIRCUIT IS CONTRARY TO TWENTY-TWO YEARS OF PREVIOUS CASE LAW ESTABLISHED BY THE SUPREME COURT.

In 19,5 the sponsoring legislators in the Colorado General Assembly drafted the bill which was later to become Section 39-3-112 based on a Michigan statute which was held constitutional by the United States Supreme Court in three cases, all in 1958. The three cases, U.S. v. Township of Muskegon, 355 U.S.

484 (1958), U.S. v. Detroit, 355 U.S. 466 (1958) and City of Detroit v. Murray Corporation, 355 U.S. 489 (1958), were cited to the Federal District Court and to the United States Court of Appeals for the Tenth Circuit by the Appellants for the proposition that the Michigan taxing statute involved there is substantively, if not word for word, identical to the Colorado statute which, having previously undergone constitutional scrutiny by the Supreme Court, should be held constitutional in this case as well. The Tenth Circuit distinguished two out of the three Michigan cases on grounds that the factual context in which the private contractor used government owned property was different from that involving Rockwell International at Rocky Flats. Although it may have had good, but unexplained reasons for doing so, the Tenth Circuit did not even acknowledge the fact that the statute in the three cases is the twin of the Colorado statute. In addition, in distinguishing the three Michigan cases from the Rocky Flats case, the

Tenth Circuit apparently confused the three fact patterns. The facts of U.S. v. Detroit, supra, and City of Detroit v. Murray Corporation, supra, are dissimilar to the case at bar. However, the facts of U.S. v. Township of Muskegon are practically on all fours with the present case. Specifically, the Tenth Circuit stated that Township of Muskegon was distinguishable from the Rockwell-Department of Energy situation on grounds that Continental Motors Corporation "apparently made goods which were sold to the United States under contract" and Rockwell sells nothing to the United States. (Appendix p.12). Not only was Continental Motors not selling goods to the United States but it was in fact operating a government-owned plant producing components for weapons for national defense and was paid by the government under a cost-plus-fixed-fee contract. Likewise, Rockwell operates the government-owned Rocky Flats Plant where it produces nuclear triggers for weapons for national defense and is also paid under a cost-plus-fixed-fee contract. (R. 356, 360-362). This

factual similarity in Muskegon is revealed specifically in Justice Whittaker's dissent wherein it is stated at 78 S. Ct. 483 at 486:

> It [United States] simply entered into a contract with Continental providing that the latter would produce certain military supplies at a price equal to its cost, plus a fixed fee; that the work would be done in the government's plant which was to be furnished without rent (and also that the government would furnish other facilities, and might furnish certain materials, required to produce the supplies) and that Continental would not include in its "cost" for the supplies any charge for the plant and other facilities and materials furnished by the government.

It is readily apparent from the language above-quoted that, contrary to the Tenth Circuit's analysis, Muskegon is essentially on all fours factually with the present case.

The three Michigan cases were cited by Colorado as support for its position that the language of the Colorado statute has already been judged and declared

constitutional by the United States Supreme Court not once, but in three cases. Combine that with the fact that the Muskegon case is factually on all fours with the Rocky Flats case and the fact that the three cases have never been overruled or even modified and the inescapable conclusion is that 39-3-112 as applied to Rockwell's use of Rocky Flats is constitutional.

On the other hand, United States v. Boyd, 378 U.S. 39 (1964) was cited for its factual similarity to the case at bar and the similarity of contentions and positions adopted by the United States government in that case as well as this one. Both cases involve the taxation by a state of a private contractor's use of government-owned property at a Department of Energy facility which produces nuclear weapon components and does nuclear research for national defense. Other similarities included:

1. Both Union Carbide and Rockwell had "management" or "operating" contracts with DOE and its predecessors.

2. Both Union Carbide and Rockwell were reimbursed for allowable costs incurred with government funds. (R. 1110, 1111, 357).
3. Under both contracts, Carbide and Rockwell are permitted to purchase supplies, etc., without prior approval of the government. (R.1110-1118).
4. In both cases, Carbide and Rockwell exercised considerable managerial discretion day-to-day but the AEC/ERDA/DOE maintains the right to control, direct and supervise performance. (R.357, 361, 352).
5. The annual fixed-fee for both was approximately 2.8 million dollars. (R.6).
6. Under both contracts the government is obligated to reimburse the contractor for state and local taxes

incurred. (R.118, 143-145).

7. In both cases, the government claimed that the use by the contractor could not be for the contractor's own commercial advantage since private competition in the field of the manufacture of nuclear weapon components is prohibited. (R.358).

8. In both cases the contractor made no products for sale to the government or others. (R.357).

9. The government claimed in both cases that the contractor would not gain or loose anything by the efficient or inefficient use of the property despite the fact that inefficient performance would result in the loss of the contract to the contractor. (R.359).

Based on those facts, which are very similar to the facts and claims in

the case at bar, the U.S. Supreme Court held that the incidence of the tax fell on the contractor, Union Carbide, and that Union Carbide had a taxable interest in the government-owned property, namely its "use" of the property in performing its contract.

Yet the Tenth Circuit, for perhaps good, but again unrevealed reasons, chose to ignore all those factual similarities and rulings based thereon by the United States Supreme Court and distinguished Boyd from the Rocky Flats situation on the single ground that Tennessee sought to tax Union Carbide for its use of government-owned personal property purchased by Union Carbide for its use in performing its contract while Colorado seeks to tax Rockwell for its use of government-owned real and personal property, whether it was purchased by Rockwell or not. Thus the Tenth Circuit took no cognizance of the essence of the Boyd decision which was that a contractor such as Rockwell operating a Department of Energy facility under similar circumstances to those in Boyd, has an interest, namely its "use" of government prop-

erty, capable of being taxed by a local or state government.

In other words, when Colorado cited a case because it involved a similar taxing statute (the three Michigan cases) the Tenth Circuit distinguished the cases on the basis of fact, albeit Township of Muskegon cannot be distinguished even on a factual basis. When a case similar on the facts was cited (U.S. v. Boyd, supra), the Court distinguished it on the basis that it involved a different type of taxing statute.

The Tenth Circuit overlooked the application of the three Michigan cases and Boyd to this case. Boyd is authority for the proposition that under the DOE "management contract" scheme, Rockwell does have an interest in the Rocky Flats facility which is taxable by Jefferson County and the State of Colorado. The three Michigan cases stand for the rule that the incidence of the tax under 39-3-112 falls, not on the government-owned property itself, but rather on Rockwell's use of the government property and that such a statutory scheme

does not infringe on the government's immunity from state and local taxation.

II. IT IS IN THE NATIONAL AND PUBLIC INTEREST THAT THE UNITED STATES SUPREME COURT CLARIFY THE PRESENT STATUS UNDER THE LAW OF UNITED STATES V. ALLEGHENY COUNTY, 322 U.S. 174 (1944).

After acknowledging the questionable vitality of the case, the Tenth Circuit cited as the only case in support of its ruling in the present case the case of United States v. County of Allegheny, supra. The Court cited the case as supporting the idea that the incidence of the tax laid by 39-3-112 falls not on Rockwell's "use" of government-owned property, but on the property itself; that the "substance" of the statute is to "lay an ad valorem general property tax on property owned by the United States". (Appendix p.13).

First, it is somewhat perplexing as to why the Tenth Circuit would choose to judge the constitutionality of 39-3-112 in the context of U.S. v. Allegheny when it had before it the three Michigan cases

in which a statute essentially identical to the one in the present case had already been judged. The statute in the Allegheny case bears no resemblance to 39-3-112 at all. In Allegheny, the State of Pennsylvania and the County of Allegheny were merely applying the state-wide property tax law that had existed for a century to property they felt was not used or leased by Mesta Machine Company but actually possessed by Mesta as bailee. The argument of the Allegheny County Assessor was that if the machinery was in Mesta's building on assessment day, it was valued and taxed to Mesta whether it was owned by the United States or not. See 64 S.Ct. 908 at 915.

Second, as it argued in the case at bar, the United States argued in U.S. v. City of Detroit, 355 U.S. 466 (1958) that the substance of the Michigan statute (the model for 39-3-112) was to lay an ad valorem tax on government property and cited as authority Allegheny. In dismissing that argument and the application of Allegheny, the Court stated at 78 S.Ct. 474, 477:

> In arguing that the tax assessed here be struck down the appellants /United States/ rely primarily on United States v. Allegheny County, 322 U.S. 174, 64 S. Ct. 908, 914, 88 L.Ed. 1209, but we do not think that case is at all controlling. In Allegheny the Court ruled invalid a tax which the state did not contend was "anything other than the old and widely used ad valorem general property tax" to the extent it was laid on government property in the hands of a private bailee. Reviewing all the circumstances the Court concluded that the tax was simply and forthrightly imposed on the property itself, not on the privilege of using or possessing it.* * * Here we have a tax which is imposed on a party using tax-exempt property for its own "beneficial personal use" and "advantage". (Emphasis added)

The Tenth Circuit has apparently misapprehended the precendential value of Allegheny. First, the above-quoted language from U.S. v. City of Detroit, supra, appears to be on point and dispositive of the application of Allegheny to 39-3-112. Secondly, Allegheny has been overruled by United States v. City of Detroit and its companion cases as

indicated in a footnote of United States v. County of Fresno, 429 U.S. 452 (1977). The footnote in question is footnote 10 which is found at 97 S. Ct. at 705, wherein it is stated:

> Insofar as United States v. Allegheny County, supra, holds that a tax measured by the value of government-owned property may never be imposed on a private party who is using it, that decision has been overruled by United States v. City of Detroit, 355 U.S. 466, 78 S. Ct. 474, 2 L. Ed.2d 424 (1958), and its companion cases.

That footnote was cited to the Tenth Circuit as authority for the proposition that the Allegheny case, which has been relied upon by the United States in cases it has argued before federal courts since 1944, is no longer authority on any issue in this case. The Tenth Circuit's ruling in the present case indicates that it believes the Allegheny case is still viable enough to serve as the sole authority for its ruling in the present case although it admits to its questionable continued vitality. It is the case's continued vitality in today's law that needs to be clarified by the United States Supreme Court once and for all.

Even if Allegheny is authority on certain issues, the case has no application to the present case. The Tenth Circuit was obviously of the opinion that there is no difference between the statutory scheme by which Pennsylvania attempted to tax the government machinery in Mesta's plant and the statutory scheme by which Colorado is taxing Rockwell for its use of real and personal property at Rocky Flats. However, the United States Supreme Court decided that there was a difference between the two statutory schemes sufficient to allow Michigan to tax three private contractors for their use of government property while striking down Pennsylvania's attempts to tax Mesta's possession by bailment of government property.

Finally, there are practical as well as legal reasons that are of paramount national interest in this case. Local government, cities and counties, need additionsources of revenue more today than they ever have in the past. They find themselves in a financial pinch between the over-burdened taxpayer who will not give his consent through the election process to any increase in his tax burden and the inflation-fueled

spiraling costs of delivering even the basic governmental services to the citizenry. The local property taxpayer can no longer afford to have massive amounts of property removed from the tax rolls at the whim of the federal government. It is bad enough when 6,500 acres of previously tax property is removed from the tax roll, but then the property is put to a use whereby a large corporation such as Rockwell International is able to reap a profit and bring in thousands of employees who use the local governmental services including police protection, roads and schools. A majority of the tax base which supports and funds the services through the property tax is business. In this case, Rockwell and its employees not only use the normal services of police protection, schools and roads, but, in addition, Rockwell has required extraordinary services of the Jefferson County District Attorney's office, Jefferson County Sheriff's Department and the Jefferson County Court system in order to handle, process and prosecute protestors who have on several occasions over the past several years deliberately blocked the railroad tracks and road entrances into the Rocky Flats Plant in an attempt to persuade

the federal government and the Department of Energy to close Rocky Flats or to move it to another location. The 4.6 million dollars per year that Rockwell would be required to pay in taxes under 39-3-112 would not even pay for the extraordinary services on a yearly basis that have been provided to the Department of Energy and Rockwell International. However, if Rockwell were to pay the taxes as was billed, it would at least help alleviate the unfair burden that each and every Jefferson County taxpayer is having to carry in order to subsidize the cost of local governmental services provided to the Rocky Flats Plant. Jefferson County taxpayers have been unfairly subsidizing the cost of those services since 1951, a period of nearly thirty years. The State of Colorado and Jefferson County have only tried to tax Rockwell International's use of government property since 1976, thus allowing twenty-five years of unfair subsidization to go unreimbursed. Even now, Jefferson County is requesting that Rockwell pay its fair share of the taxes only because it is in desperate need of funds. For the past two years, Jefferson County has been the subject of a federal district court or-

der requiring it to build a new jail to house its prisoners because of the deplorable and crowded conditions of the old jail. Jefferson County has asked the people on two occasions to approve additional funding for the new jail, once on a bond issue and once on an increase on sales taxes. On both occasions, the citizenry demonstrated its unwillingness to be further taxed even for such a necessary facility as a jail. The harried taxpayer, attempting to recoup his losses due to the inflation-caused increases in his federal income taxes is, more than ever, determined to hold the line on property taxes at the local level which he can control by direct vote. On the other hand, the cost of asphalt, salaries of employees, mandatory federal and state social programs continue to escalate in cost. The funds have to come from somewhere. Now is not the time to close a source of revenue which has been approved by the United States Supreme Court since the three Michigan cases were decided in 1958. Congress has expressed its approval as well by its repeal of Section 9(b) of the Atomic Energy Act of 1946, said Section 9(b) providing at that time that contractors dealing with the Atomic Energy Commission could not be subject

to state and local taxation. The purpose of the repeal is revealed in the excerpt from the senate report quoted in footnote 10 of United States v. Boyd, 84 S.Ct. at 1525.

To date, Tennessee (U.S. v. Boyd, supra), Michigan (United States v. Detroit, supra, and its companion cases), New Mexico (U.S. v. New Mexico, No. 78-1755 (10th Cir.1980), and California (U.S. v. County of Fresno, supra) are all permitted to collect taxes from the private users of government property. Colorado should not be singled out by the United States Court of Appeals for the Tenth Circuit for different treatment. Similarly, Jefferson County taxpayers should be treated no differently than the taxpayers of the states mentioned above. They should not have to pay an inordinately larger tax bill in order that companies such as Rockwell International, Martin Marietta Corporation, concessionaires at the Denver Federal Center and other governmental facilities within the boundaries of Jefferson County do not have to pay any taxes at all on their use of government-owned property.

The United States will argue as it

has in the past in this case that the tax of 4.6 million dollars exceeds the 2.8 million dollar fixed-fee earned by Rockwell in 1976 and that therefore the tax is confiscatory; that the statute, in order to be constitutional, should require the apportionment of valuation of the government property between the United States' ownership interest and Rockwell's interest in the use of the property as opposed to taxing Rockwell based on the full market value of the property used. In other words, any property or use tax should be required to be less than a corporation's or taxpayer's profit or fixed-fee in any given year. The logical extension of that argument would be that a property taxpayer such as General Motors could go to the local taxing authorities and state that they had a bad year in terms of profits for 1980 and in fact showed no profit. Therefore, they would argue, that because they made no profit they should not be required to pay any property taxes to support the local schools and other governmental services that they and their employees consumed because any property tax at all would exceed their profit in that

year and such tax would thereby be confiscatory. The absurdity of such an argument is patent on its face. Courts have required that income taxes be reasonably related to the profit earned, that sales taxes be reasonably related to the amount of goods sold and that property taxes be reasonably related to the value of the property taxed. No court has ever held that a property or use tax had to be reasonably related to profits earned. To so rule would be to enable any business taxpayer to manipulate his income such that he showed little or no profit and thus escape paying any property taxes at all.

For the reasons stated herein, the Appellants, State of Colorado, County of Jefferson, the County Assessor and the Board of County Commissioners contend that this is a case of importance to every state now considering imposing or already imposing a tax such as 39-3-112 on a government contractor inasmuch as the Tenth Cirucit decision appears to overrule the three Michigan cases as well as the Boyd case, and, for that reason, requires plenary consideration by the Supreme Court with briefs on the merits and oral argument for its resolution.

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October, 1980

CERTIFICATE OF SERVICE

It is hereby certified that service of this Jurisdictional Statement has been made on opposing counsel by depositing in a United States postage mail box, with first-class postage prepaid, three copies thereof on this 30th day of October, 1980, properly addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

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Attorney for Defendants-Appellants

APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 79-1193

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STATE OF COLORADO; JEFFERSON COUNTY, COLORADO; BOARD OF COUNTY COMMISSIONERS OF JEFFERSON COUNTY, COLORADO; and DAVID R. BRADEN, County Assessor, Jefferson County, Colorado, Defendants-Appellants.	Appeal from the United States District Court for the District of Colorado (D.C.Civil Action No. 76-M-1189)

John J. McCarthy (M. Carr Ferguson, Assistant Attorney General, and Gilbert E. Andrews and David English Carmack, Attorneys, Tax Division, Department of Justice, with him on the brief), Washington D.C. Of Counsel: Joseph F. Dolan, United States Attorney, and Jerre W. Dixon, Assistant United States Attorney, Denver, Colorado

Gail E. Shields, Special Counsel for Jefferson County, Board of County Commissioners and County Assessor (Stephen H. Kaplan, First Assistant Attorney General, and Billy Shuman, Special Assistant Attorney General, with him on the brief), Denver, Colorado.

Before McWILLIAMS, BREITENSTEIN and DOYLE, Circuit Judges. McWILLIAMS, Circuit Judge.

The Rocky Flats Plant is a part of an integrated system of government-owned laboratories and plants operated to develop and produce nuclear weapons for national defense and is located in Jefferson County, State of Colorado. Rocky Flats consists of approximately 6,500 acres of land and approximately 95 buildings and structures, all of which are owned in fee simple by the United States.

The actual operation and day-to-day management of the Rocky Flats Plant has been accomplished through private companies acting under management contracts with the United States. Rockwell International is presently operating and managing the Rocky Flats Plant under a management contract referred to as Contract 3533. Rockwell is paid a fixed annual fee for its services.

In 1975 the Colorado General Assembly enacted a statute, now referred to as Colo. Rev. Stat. § 39-3-112 (1973) (as amended), which provides in pertinent part as follows:

> (1) When any property . . . exempt from taxation is leased, loaned, or otherwise made available to and used by a . . . corporation in connection with a business

> conducted for profit, the lessee or user thereof shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property . . . .

In 1976 the Jefferson County Tax Assessor notified Rockwell that it was a "user" of tax-exempt property, i.e. the Rocky Flats Plant, within the meaning of the Colorado statute and was liable for the tax on such use. For the taxable year of 1976 the property was given a market value of $200,787,951 and an assessed value of $61,263,380. These total values were based on the following component values:

	Market Value	Assessed Value
Land (350 Acres at $5,000 per acre	$ 1,750,000	$ 552,000
Improvements	125,506,215	38,651,860
Machinery & Equipment	73,531,736	22,059,520
	$200,787,951	$61,263,380

Using the assessed values set forth above, the County Assessor for Jefferson

County assessed Rockwell $4,632,246.69 for the year 1976 with respect to the Rocky Flats Plant. To the extent that any such taxes are due from Rockwell, the United States is obligated by Contract 3533 to provide funds for payment thereof, as such a charge is defined under that contract as a cost to be borne by the United States.

It was in this general setting that the United States brought the present action against the State of Colorado, the County of Jefferson, and various county officials, seeking a declaratory judgment that the tax sought to be imposed by Jefferson County on Rockwell was in reality a tax on property owned by the United States, and, as such, barred by the Supremacy Clause of the United States Constitution. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

The parties agreed to a detailed stipulation of facts, and each moved for summary judgment. The trial court granted the motion of the United States, and entered judgment in favor of the United States. Basically, the trial court concluded that the tax which Jefferson County

ostensibly sought to impose on Rockwell was in reality a tax on property owned by the United States, and therefore infringed on the immunity of the United States from the imposition of local taxes on government property. Specifically, the trial court held that the Colorado statute, as it was sought to be applied, was unconstitutional. The trial court's Memorandum Opinion and Order was published and appears as United States v. State of Colorado, 460 F.Supp. 1184 (D.C. Colo. 1978).

The State of Colorado initially argues that the United States does not have standing to bring the instant action, and that Rockwell is an indispensable party. We do not agree. In United States v. Bureau of Revenue of State of New Mexico, 291 F. 2d 677 (10th Cir. 1961) we rejected a similar argument. In that case we held that the United States was the proper party, indeed the real party in interest, to prosecute an action to protect its sovereign rights and to assert the constitutional immunity of the United States from taxation by a state. See also United States v. Allegheny County, 322 U.S. 174, 191 (1944), where the Supreme Court held

that "/t/he United States may question the taxation in order to protect its sovereignty ove the property in question." It therefore follows that Rockwell is not an indispensable party.

Proceeding to the merits of the controversy, the key to the present problem is the relationship between Rockwell and the United States and the nature of the activity which the State of Colorado seeks to tax. From the stipulated facts we learn that Rockwell has a management contract with the United States. The managerial services which Rockwell is obligated to perform are to be performed at the Rocky Flats Plant. Rockwell does not have any lease, permit or license to the property in question, which is owned in fee simple by the United States. Any "use" it may make of the property is strictly delineated by the contract. In such circumstance, we agree with the trial court that the efforts of the State of Colorado to impose a tax on Rockwell under the provisions of Colo. Rev. Stat. § 39-3-112 (1973) (as amended) is in reality a tax on the property itself and, as such, barred under the doctrine of implied immunity first found in McCulloch v. Maryland,

17 U.S. (4 Wheat.) 316 (1819).

In arguing for reversal, the State of Colorado relies upon such cases as United States v. Boyd, 378 U.S. 39 (1964); United States v. City of Detroit, 355 U. S. 466 (1958); and United States v. Township of Muskegon, 355 U.S. 484 (1958). Those cases admittedly have similarities to the instant one, but we believe each to be distinguishable.

United States v. Boyd, 378 U.S. 39 (1964) concerns the efforts of the State of Tennessee to impose a so-called contractor's use tax on Union Carbide Corp. and H. K. Ferguson Co., each of which had contracts with the Atomic Energy Commission relating to work and services to be performed at a nuclear plant in Oak Ridge, Tennessee. Under those contracts Union Carbide and Ferguson procured materials, supplies and equipment which were used by the two companies in the performance of their contractual obligations to the Atomic Energy Commission. Title to materials thus purchased passed directly from the vendor to the United States. Tennessee collected from Carbide and Ferguson a sales tax, and a contractor's use tax upon purchases made by them under their con-

tracts with the Commission. The companies and the Commission sued to recover the taxes thus paid, claiming that their collection infringed upon the implied constitutional immunity of the United States. The Tennessee Supreme Court refused to permit the collection of the sales tax, but sustained the collection of the contractor's use tax. On appeal, the United States Supreme Court affirmed.

The Tennessee contractor's use tax imposes a tax on contractors using property in performance of their contracts irrespective of the ownership of the property and of the place where the goods are purchased. The tax, at the sales and compensating use tax rate, is measured by the purchase price or fair market value of the property used by the contractors and is to be collected only when a sales tax on local purchases or a compensating use tax on out-of-state goods has not previously been collected in connection with the same property.

In Boyd, the State of Tennessee imposed this contractor's use tax on contractors who purchased personal property from third parties and thereafter used such property in the course of performing

under their contracts with the United States. In the instant case the State of Colorado is not seeking to impose a tax on goods acquired by Rockwell from third parties and then used by Rockwell in performing under its contract with the United States. Rather, the State of Colorado seeks to impose a tax on Rockwell to be measured by the value of the Rocky Flats Plant, which, as indicated, is wholly government owned, on the basis that Rockwell is "using" the land and improvements when it goes onto the Rocky Flats facility to render the management services called for by the contract. We think the present case thus differs significantly from Boyd.

United States v. City of Detroit, 355 U.S. 466 (1958) is also considerably different than the instant one. There the United States owned an industrial plant in Detroit, Michigan. It leased a portion of the plant to the Borg-Warner Corporation which was to be used by the latter in its private manufacturing business. A Michigan statute provides that when tax-exempt real property is used by a private party in a business conducted for profit the private party is subject to taxation to

the same extent as though he owned the property. The Michigan courts upheld the tax as applied to Borg-Warner, and, on appeal, the United States Supreme Court affirmed. In our view Borg-Warner and Rockwell are by no means similarly situated. Borg-Warner leased government real property and conducted thereon its own private manufacturing business. Rockwell is merely going onto government owned property where it performs its management services.

United States v. Township of Muskegon, 355 U.S. 484 (1958) is quite close to the City of Detroit case. In Muskegon the United States permitted Continental Motors Corporation to use a government owned manufacturing plant where it apparently made goods which were sold to the United States under contract. Muskegon, then, like City of Detroit, involves private corporations going onto government property and there producing goods which are later sold for a profit. Neither is akin to the instant case, where Rockwell is merely performing its contractual obligations on government owned property.

Although the continued vitality of United States v. County of Allegheny, 322

U.S. 174 (1944) has been questioned, it nonetheless approximates the present case. In Allegheny, Mesta Machine Company entered into a contract to manufacture ordnance for the United States. Certain equipment was installed in Mesta's plant at government cost and was to remain the property of the United States. The State of Pennsylvania revised upward Mesta's previously determined assessment for ad valorem taxes by the value of the government furnished and government owned equipment installed in the Mesta plant. The Supreme Court of Pennsylvania upheld the increased tax on Mesta, but the United States Supreme Court reversed. The Supreme Court, in reversing, commented that the "substance of this procedure is to lay an ad valorem general tax on property owned by the United States." 322 U.S. at 185. We believe that the "substance" of the present procedure is not to tax Rockwell's "use" of government owned property but to lay an ad valorem general property tax on property owned by the United States.

Judgment affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 76 M 1189

UNITED STATES OF AMERICA,
Plaintiff,
v.
STATE OF COLORADO; JEFFERSON COUNTY, COLORADO; BOARD OF COUNTY COMMISSIONERS OF JEFFERSON COUNTY, COLORADO; and DAVID R. BRADEN, County Assessor, Jefferson County, Colorado,
Defendants.

MEMORANDUM OPINION AND ORDER

MATSCH, Judge

This is an action brought by the United States under 28 U.S.C. § 2201 to obtain a declaratory judgment that taxes assessed and levied under the authority of a Colorado Statute upon real and personal property located at a facility known as the Rocky Flats Plant in Jefferson County, Colorado, infringe upon the immunity of the United States from state and local taxation in violation of the Constitution of the United States. Jurisdiction exists under 28 U.S.C. § 1345. The defendants initially moved to dismiss for lack of

standing and that motion was denied because the question of standing was dependent upon the merits of the plaintiff's position. A stipulation of facts was filed on October 13, 1977 and upon those facts the respective parties filed motions for summary judgment on the questions of applicability of the subject state statute and the Government's claim of immunity. An additional claim of discriminatory application of the statute has been deferred.

AGREED FACTS

Because the parties have agreed that this court can determine the merits of the principal controversy under the provisions of Rule 56 of the Federal Rules of Civil Procedure, it is not necessary to set forth all of the material facts. Accordingly, the full stipulation of October 13, 1977 is incorporated by this reference and only those facts which are necessary to an articulation of the reasoning and results reached are set out here.

The Atomic Energy Commission (AEC) was created as an independent agency of the United States Government by the Atomic Energy Act of 1946 and continued under the Atomic Energy Act of 1954. The AEC was

abolished by the Energy Reorganization Act of 1974 and certain of its functions were transferred to the Energy Research and Development Administration (ERDA), effective January 19, 1975. One of those functions was and is the direction of the activities of the Albuquerque Operations Office (ALO) relating to the research, development, and production of nuclear weapons for national defense.

Under the Department of Energy Organization Act, Public Law 95-91, ERDA was abolished and all of its functions, including all of the activities of the ALO were transferred to the Department of Energy (DOE), effective October 1, 1977. That change has no effect upon the issues in this litigation and, for convenience, reference is made to ERDA throughout this opinion.

In 1951 the United States acquired approximately 2,500 acres of land in Jefferson County, Colorado, as the site for certain production facilities with related buildings and structures which came to be known as the Rocky Flats Plant. Additional land was acquired in 1974 and 1975 and the production facilities with related

structures were expanded. At the time relevant to this lawsuit, the Rocky Flats Plant consists of approximately 6,500 acres of land and approximately 95 buildings and structures, all of which are owned in fee simple by the United States.

Rocky Flats is and always has been part of an integrated system of Government-owned laboratories and plants operated in furtherance of the responsibilities of AEC and ERDA to develop and produce nuclear weapons for national defense. The production of certain components for nuclear weapons has always been the primary mission of the Rocky Flats Plant. While other incidental research, development and production functions have taken place there, such activity has been carried on only to the extent that ERDA has specifically directed it and provided appropriate Government funds. No work of any kind on behalf of any private entities has ever been or is now undertaken or carried out at the plant.

The actual operation and direct management of the Rocky Flats Plant have been accomplished through private companies under management contracts with AEC and ERDA.

The Dow Chemical Company (DOW) managed and operated the plant from July 1, 1952 through June 30, 1975. Rockwell International Corporation (Rockwell) undertook that responsibility beginning on July 1, 1975 under a contract which, as modified, is now designated Contract EY-76-C-04-3533 (Contract 3533), a complete copy of which is included in the agreed record in this case.

The administration of that contract and the previous agreements with DOW has been the responsibility of ALO, which has always maintained a subordinate field office located at the plant. There are approximately 60 ERDA employees at that field office performing such administrative activities as budget and financial management, safety, security, industrial relations and inspection and acceptance of the final products produced by Rockwell for ERDA.

ERDA provides, directly from the United States Treasury through the letter-of-credit method of advanced funding, all of the funds necessary to sustain the operation of the Rocky Plats Plant under Contract 3533 and no funds come from Rockwell. The United States owns all tangible personal property of every kind and description

used in the operation of the Rocky Flats plant, including ingredients and components used in all plant operations and all property used in the production process. No property of Rockwell is used or required to be used in these operations. All valid obligations incurred in furtherance of the operations of the plant are recognized as Government liabilities and while the usual practice is for payments to be made by Rockwell from ERDA funds in ERDA bank accounts, ERDA may elect to make payment directly to the obligees. Rockwell's entire role or relationship to the Rocky Flats Plant is defined in Contract 3533.

In general, the agreement is that Rockwell provides the services of its employees in exchange for the payment of a fixed fee which is negotiated annually. Rockwell's fixed fee for the period of July 1, 1975 through September 30, 1976 was $2,850,000.00 and for the period of October 1, 1976 through September 30, 1977 the fee was $2,400,000.00. Because Rockwell bears none of the costs, the fixed fee may be considered its profit from the operation.

The basic raw material for the nuc-

lear components produced at the Rocky Flats Plant is plutonium which is "special nuclear material" as defined in Section 11aa of the Atomic Energy Act (42 U.S.C. § 2014 (aa)). The scope of the primary production activity carried on at the Rocky Flats Plant is subject to the express consent and direction of the President of the United States which must be obtained at least once each year under 42 U.S.C. §2121 (a)(2) and it is only in accordance with such authorization that ERDA issues directions to Rockwell to manufacture products according to the specifications and in the quantities prescribed. Any products which do not meet such specifications are recycled or otherwise disposed of according to ERDA directions and at its sole expense, without any loss of fee or other penalty to Rockwell. During the times in issue here the plant has operated at no more than 28% of capacity.

The fixed fee payment is the only direct financial profit which Rockwell receives from the plant. While the experience gained by Rockwell personnel could be considered to be of indirect benefit to its private commercial operations, such

intangible benefits are not subject to any monetary valuation and Rockwell has no private commercial operation comparable to the work done at the Rocky Flats Plant.

The Colorado General Assembly enacted Senate Bill No. 86, now C.R.S. 1973, § 39-3-112, as amended, effective January 1, 1976. In pertinent part that statute provides:

> (1) When any property . . . exempt from taxation is leased, loaned, or otherwise made available to and used by a . . . corporation in connection with a business conducted for profit, the lessee or user shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property. . .

Upon the authority of that statute the Jefferson County Tax Assessor notified Rockwell by a letter dated May 27, 1976 that it was the "user" of property which for the taxable year 1976 was given a market value of $200,787,951.00 and an assessed value of $61,263,380.00. The components of those totals were given as follows:

	Market Value	Assessed Value
Land: 350 A at $5,00/A	$ 1,750,000	$ 552,000
Improvements:	125,506,215	38,651.860
Mach. & Equip.	73,531,736	22,059,520
Total	$200,787,951	$61,263,380

The assessor used figures and other information provided by ERDA representing the book value of the improvements to the land, building and structures, utilities and equipment at the Rocky Flats Plant as of April 30, 1976. Those Government figures did not include land values and it is not clear from the record how the determination of market value of the land was made. Rockwell was billed $4,632,246.69 for taxes payable to Jefferson County, Colorado for the year 1976 and all of the administrative remedies were exhausted before this suit was filed.

THE LAW

The defendants' position is that this case is controlled by the decision in United States v. Boyd, 378 U.S. 39 (1964). There, Union Carbide Corporation and H. K. Ferguson Company brought suit in a Tenn-

essee Court to recover sales and use taxes paid under protest. The United States joined as co-complainant. Both taxpayers had cost-plus fixed fee contracts with the AEC for construction and operations activities at the Oak Ridge, Tennessee facility. The Supreme Court of Tennessee in a written opinion reported at 363 S.W.2d 193 (1962) concluded that because the contractors' purchases were made with funds advanced by the Government and because title to all property purchased passed directly from the vendors to the Government, the imposition of the Tennessee sales tax was an invalid direct tax upon the Government under the doctrine of implied immunity first found in McCulloch v. Maryland, 4 Wheat. 316 (1819). The Tennesee Court reached a different result as to application of the Tennessee Use Tax. Having determined that the companies were independent contractors and not agents of the AEC, the Court found that they were subject to the Tennessee Tax imposed upon the privilege of use by a contractor of tangible personal property, without regard for title, where such property had not previously borne a sales tax.

In affirming that result, the United States Supreme Court agreed that the companies had a "separate taxable interest" in the Oak Ridge operation. 378 U.S. 39 at 44-45. Because the Supreme Court also agreed that these cost-plus contractors were not so incorporated into the governmental structure as to become instrumentalities of the United States, their separate interests were not protected by governmental immunity. The Supreme Court seems to have accepted, without discussion, the implicit notion that a percentage tax on the cost of materials and supplies obtained by the contractors with Government funds would constitute an appropriate measure of such separate interests.

This case is quite different from Boyd because Colorado has made no effort to identify or to separate the Government's ownership interest from Rockwell's beneficial use of the property at Rocky Flats. The Jefferson County Assessor simply applied the statutory assumption that the value to the contractor was identical with the value to the owner.

The error of the defendants' position becomes apparent by comparing the amount

of the tax with the fixed fee payment to Rockwell. Here Rockwell is being called upon to pay a tax which is almost double the amount of the total payment for its contract services. It is inconceivable that the value of an independent contractor's beneficial use interest in Government property can be considered to be so much greater than the amount which the Government is willing to pay to that contractor. The fact that it is Rockwell's contractual right to pass on that burden to the Government does not save the conceptual incongruity of this tax.

Under Boyd, supra, Contract 3533 can be considered to be an arrangement for the mutual benefit of Rockwell and the United States. The Supreme Court has said there is no constitutional impediment to state and local taxation of the benefit to Rockwell as measured by its separate interest in the Government-owned property used in the performance of the contract. When, however, a tax is imposed upon the whole value of the property, it is obvious that the tax is also being imposed upon the Government's interest and that is contrary to the Constitution.

The most recent Supreme Court opinion concerning the immunity from state taxation inherent in the Supremacy Clause is United States v. County of Fresno, 429 U.S. 452 (1977). There the Court approved a California statute which authorized counties to tax private interests in publicly owned property where the taxable possessory interest was measured by the fair rental value. Specifically, the case involved employees of the United States Forest Service who were required to live in Government-owned houses located in national forests. The Government recognized a benefit to the employees by taking deductions from their salaries of amounts which reflected the fair rental value of similar privately owned houses, discounted by the disadvantages of location and lack of amenities. Essentially the same factors were used by the counties in computing the values of the possessory interest on which the taxes were imposed. Accordingly, the measure of the tax was proportionate to the degree of the beneficial use by the employees and no part of the tax was upon the Government's interest in the property.

Here, the Jefferson County Assessor

made no effort to segregate Rockwell's interest in Rocky Flats and limit the tax to that interest. Indeed, the state statute itself appears to preclude that possibility because it provides that the user shall be subject to taxation "in the same amount and to the same extent" as if it were the owner of the property.[1] That is nothing less than a general ad valorem property tax imposed on United States property. It is a tax on the property itself rather than on Rockwell's beneficial use of it.

It was just such a tax which was invalidated in United States v. Allegheny County, 322 U.S. 174 (1944). There, a

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1. C.R.S. 1973 § 39-3-112 (1), as amended.

It is interesting that the Colorado General Assembly took a different approach to the recreational use of federal lands. Subsection (6) of this statute provides:

> The valuation for assessment of lands owned by the United States and used for recreational purposes shall be thirty percent of the fees paid by the user of said lands to the United States for the use thereof in the previous calendar year.

manufacturing company under contract to produce guns for the War Department used Government-owned machinery to supplement its existing plant facilities. The county tax assessor valued that machinery and included it in the assessment of the private plant which was then taxed as a unit. The tax law was held to be invalid insofar as it was interpreted to authorize taxation of the property interest of the United States, or to use that interest to enhance the tax upon the company. Pointing out that the state had "made no effort to segregate /the company's/ interest and tax it," the Court raised but did not decide the question of whether a separate and identified beneficial use of such property could be taxed by appropriate proceedings. 322 U.S. at 186-187.

The Allegheny decision was discussed by the Supreme Court in Footnote 10 of the Fresno opinion. There the Court observed that United States v. City of Detroit, 355 U.S. 466 (1958) and its companion cases had overruled Allegheny insofar as it could be understood to hold that a tax measured by the value of Government-owned property may never be imposed on a private party who is using it. However, the

Court recognized the continuing vitality of the Allegheny decision with respect to the need for segregating any beneficial and taxable interest from the full value of Government-owned property where there are limitations imposed on the use of that property:

> Insofar as /Allegheny/ stands for the proposition that Government property used by a private citizen may not be taxed at its full value where contractual restrictions on its use for the Government's benefit render the property less valuable to the user, the case has no application here. Appellee counties have sought to tax only the individual appellants' interests in the Forest Service houses and have reduced their assessments to take account of the limitations on the use of the houses imposed by the Government.

429 U.S. 452 at 463 n.10.

By taxing the totality of the land, improvements and personal property used in the operations of the Rocky Flats Plant, without accounting for any of the imposed limitations on Rockwell's use of the property, the defendants have subjected the property and activities of the Federal

Government to state and local taxation and thereby infringed upon the immunity of the United States from the imposition of taxes on its own property.

Having determined that the subject taxes are contrary to the Constitution and that the Colorado statute does not admit of any approach different from that which was taken by the county assessor here, it must be concluded that the plaintiff is entitled to the entry of a summary judgment holding that the state statute as applied to the Rocky Flats Plant is unconstitutional and it is not necessary to consider the remaining question of whether there has been any discriminatory application of the statute.

Upon the foregoing, it is

ORDERED that the Clerk shall enter a declaratory judgment in accordance with this memorandum opinion and order and award the plaintiff's costs to be taxed.

Dated: November 28, 1978.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, Plaintiff, vs. STATE OF COLORADO; JEFFERSON COUNTY, COLORADO; BOARD OF COUNTY COMMISSIONERS OF JEFFERSON COUNTY COLORADO; and DAVID R. BRADEN, County Assessor, Jefferson County, Colorado, Defendants.	)

Civil Action No. 76-M-1189

DECLARATORY JUDGMENT

Pursuant to and in accordance with the Memorandum Opinion and Order entered by the Honorable Richard P. Matsch on November 28, 1978, it is

ORDERED AND ADJUDGED that Summary Judgment is entered for Plaintiff declaring that Colorado Revised Statute, 1973, 39-3-112(1), as amended, effective January 1, 1976, and as applied to the Rocky Flats Plant is unconstitutional. It is

FURTHER ORDERED AND ADJUDGED that it is not necessary to consider the remaining question of whether there has been any discriminatory application of the statute. It is

FURTHER ORDERED that the Plaintiff shall recover its costs upon the filing of a Bill of Costs with the Clerk of this Court within ten days from the date of entry of this Judgemnt.

Dated at Denver, Colorado, this 2nd day of November, 1978.

FOR THE COURT:

JAMES R. MANSPEAKER,
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JULY TERM - July 25, 1980

Before the Honorable Robert H. McWilliams, Honorable Jean S. Breitenstein, and Honorable William E. Doyle, Circuit Judges

UNITED STATE OF AMERICA, Plaintiff-Appellee, vs. STATE OF COLORADO; JEFFERSON COUNTY, COLORADO; BOARD OF COUNTY COMMISSIONERS OF JEFFERSON COUNTY, COLORADO; and DAVID R. BRADEN, County Assessor, Jefferson County, Colorado, Defendants-Appellants.	)	J U D G- M E N T No.79-1193 (D.C. No.76-M-1189)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of the court is affirmed.

HOWARD K. PHILLIPS,
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JULY TERM - September 3, 1980

Before Honorable Robert H. McWilliams, Honorable Jean S. Breitenstein, and Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. STATE OF COLORADO; JEFFERSON COUNTY, COLORADO; BOARD OF COUNTY COMMISSIONERS OF JEFFERSON COUNTY, COLORADO and DAVID R. BRADEN, County Assessor, Jefferson County, Colorado, Defendants-Appellants.	No.79-1193

This matter comes on for consideration of the petition for rehearing filed by the appellants in the captioned cause.

The Court also has for consideration appellee's bill of costs and appellants' objection thereto.

Upon consideration whereof, it is ordered as follows:

1. The petition for rehearing is denied.

2. Appellants' objection to appellee's bill of costs is overruled. The Clerk shall prepare and certify an itemi-

zed statement of appellee's costs in the amount of $268.48 for insertion in the mandate and to be taxed against the appellants.

HOWARD K. PHILLIPS,
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 79-1193

SEPTEMBER TERM - October 1, 1980

Before Honorable Robert H. McWilliams, Honorable Jean S. Breitenstein, and Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. STATE OF COLORADO: JEFFERSON COUNTY, COLORADO; BOARD OF COUNTY COMMISSIONERS OF JEFFERSON COUNTY, COLORADO; and DAVID R. BRADEN, County Assessor, Jefferson County, Colorado. Defendants-Appellants.	No. 79-1193 (D.C.No. 76-M-1189)

This matter comes on for consideration of the motion of defendants-appellants to recall the mandate and to stay the reissuance of it pending application for certiorari.

Upon consideration whereof, it is the order of the Court:

1. The mandate issued to the United States District Court for the District of Colorado on September 11, 1980, in the captioned cause is hereby recalled.

2. Reissuance of the mandate is

stayed until November 1, 1980, and if, on or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court.

HOWARD K. PHILLIPS,
Clerk

Colorado Revised Statutes, 1973, (1976 Cum. Supp.):

39-3-112. Taxation of exempt property - taxes not to become lien. (1) When any property which for any reason is exempt from taxation is leased, loaned, or otherwise made available to and used by a private individual, association, or corporation in connection with a business conducted for profit, the lessee or user thereof shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property, except as provided in this subsection (1) and as provided in subsections (3), (4), and (5) of this section.

(2) Taxes shall be assessed to such lessee or user of property and collected in the same manner as taxes assessed to owners of such property; except that such taxes shall not become a lien against the property. When due, such taxes shall be a debt due from the lessee or user to the board of county commissioners for the county where said property is located, and in the city and county of Denver to such other body by direct action in debt on

behalf of each governmental entity for which a tax levy has been made.

(3) This section shall not vary in any manner the taxation of mines or oil and gas or oil shale or geothermal leaseholds and lands under articles 1 to 13 of this title. The valuation for assessment of mines or oil and gas or oil shale or geothermal leaseholds and lands shall be determined pursuant to articles 6 and 7 of this title.

(4)(a) This section shall not apply to any property owned by a home rule or statutory county, city and county, city, or town, or by a territorial charter city, if such property is subject to payments in lieu of taxes under section 29-3-120, C.R.S. 1973.

(b) This section shall not apply to any property owned by a home rule or statutory county, city and county, city, or town, or by a territorial charter city, if such property was, before July 1, 1976, leased, loaned, or otherwise made available to and used by a private individual, association, or corporation in connection with a business conducted for profit; but such

exemption shall not extend beyond the term of such lease or loan or option included in the agreement in effect before said date.

(c) This section shall not apply to rights-of-way or easements acquired by public utilities or for access roads.

(d) This section shall not apply to any property owned by a political subdivision of the state which is used in the provision of normal facilities, services, or operations authorized by constitution or statute to be provided by such political subdivisions.

(5) This section is not applicable to lands used solely for agricultural purposes and improvements thereon.

(6) The valuation for assessment of lands owned by the United States and used for recreational purposes shall be thirty percent of the fees paid by the user of said lands to the United States for the use thereof in the previous calendary year.

(7) Nothing in this section shall be construed to apply to properties exempted by territorial charter.

Source: Added, L.75, p.1462, §3;(4) repealed and reenacted, L.76, p.766, § 1.

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 79-1193

Filed:10th Circuit
October 23, 1980

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STATE OF COLORADO; JEFFERSON COUNTY, COLORADO; BOARD OF COUNTY COMMISSIONERS OF JEFFERSON COUNTY, COLORADO and DAVID R. BRADEN, County Assessor, Jefferson County, Colorado, Defendants-Appellants.	NOTICE OF APPEAL

COME NOW the Defendants-Appellants, by and through the Attorney General for the State of Colorado, and G.E. Shields, Special Counsel for all other served Defendants and hereby give notice that Defendants-Appellants appeal to the Supreme Court of the United States of America the Order of the United States Court of Appeals for the Tenth Circuit entered on July 25, 1980, for Plaintiff-Appellee declaring Colorado Revised Statute 1973, 39-3-112 (1), as applied to the Rocky Flats Plant, unconstitutional under the Supremacy Clause. Jurisdiction of the Supreme Court of the United States to review by appeal a judgment of the United States Court of Appeals declaring a state statute

unconstitutional is conferred by 28 U.S.C. Section 1254. (2).

Dated at Denver, Colorado, this 23rd day of October, 1980.

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No. 80-714

DEC 31 1980

In the Supreme Court of the United States

OCTOBER TERM, 1980

JEFFERSON COUNTY, COLORADO, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the imposition of a Colorado property tax upon a private contractor engaged to manage a nuclear weapons facility owned by the United States violates the federal government's constitutional immunity from state taxation, where such tax does not segregate the contractor's interest (if any) in the use of the government-owned property but is based upon the fair market value of the property to which the contractor had access only for the purpose of performing the contract, and where the tax amounts to almost twice as much as the contractor's fixed management fee.

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Pursuant to Rule 16.1 of the Rules of this Court, the appellee, the United States of America, moves that the judgment of the court of appeals be affirmed.

OPINIONS BELOW

The memorandum opinion and order of the district court (J.S. App. 12-28) is reported at 460 F. Supp. 1184. The opinion of the court of appeals (J.S. App. 1-11) is reported at 627 F.2d 217.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1980 (J.S. App. 31). A timely petition for rehearing was denied by the court of appeals on September 3, 1980 (J.S. App. 32-33). On October 23, 1980, the notice of appeal was filed (J.S. App. 39-40). The jurisdictional statement was filed with this Court on October 31, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

STATUTE INVOLVED

Section 39-3-112 of the Colorado Revised Statutes of 1973, as amended, is set forth as J.S. 36-38.

STATEMENT

The Rocky Flats Plant, which has been owned in fee simple by the United States since 1951, is part of an integrated system of government-owned laboratories and plants operated in furtherance of the statutory responsibilities of the Atomic Energy Commission (AEC), Energy Research and Development Administration (ERDA), and the Department of En-

ergy (DOE) to develop and produce nuclear weapons for national defense.[1] The plant is located in Jefferson County, Colorado, and consists of approximately 6,500 acres of land and approximately 95 buildings and structures. No work of any kind on behalf of any private entities has ever been carried out at this plant (J.S. App. 2, 13-15).

The actual operation and direct management of the Rocky Flats Plant have been conducted by private companies under management contracts with AEC, ERDA and DOE. From July 1, 1952, through June 30, 1975, the Dow Chemical Company managed the plant. Rockwell International Corporation (Rockwell) undertook that responsibility beginning on July 1, 1975, under a management contract referred to as contract 3533. Rockwell is paid a fixed annual fee for its services (J.S. App. 2, 15-17). For the period July 1, 1975, through September 30, 1976, Rockwell's fixed

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[1] Initially, the Rocky Flats Plant was under the supervision and control of the AEC which was created as an independent agency of the United States Government by the Atomic Energy Act of 1946, ch. 724, Section 2, 60 Stat. 756, and continued under the Atomic Energy Act of 1954, ch. 1073, Section 1, 68 Stat. 919. The AEC was abolished by the Energy Reorganization Act of 1974, Pub. L. No. 93-438, Section 104, 88 Stat. 1237, and certain of its functions were transferred to ERDA (established by Section 101), effective January 19, 1975 (Exec. Order No. 11834, 40 Fed. Reg. 2971 (1975)). One of those functions included supervision and control of the Rocky Flats Plant. Under the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, ERDA was abolished (Section 703), and all of its functions, including the activities of Rocky Flats Plant, were transferred to DOE (Section 301), effective October 1, 1977 (Section 901; Exec. Order No. 12009, 42 Fed. Reg. 46267 (1977)). We will refer to ERDA as the government agency responsible for the Rocky Flats Plant because ERDA discharged those responsibilities at all times relevant to the period involved in this suit.

fee was $2,850,000. For the period October 1, 1976, through September 30, 1977, Rockwell's fee was $2,400,000 (J.S. App. 17).

In 1975, the Colorado General Assembly enacted a statute, now referred to as § 39-3-112, Colo. Rev. Stat. (1973), as amended, effective January 1, 1976, which provides in pertinent part as follows (J.S. 2-3, 36):

> (1) When any property * * * exempt from taxation is leased, loaned, or otherwise made available to and used by a * * * corporation in connection with a business conducted for profit, the lessee or user thereof shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property * * *.

Excluded from this tax are, *inter alia*, exempt property used for agricultural purposes, property owned by certain local governmental units and leased to private parties prior to July 1, 1976, and property owned by certain local governmental units used to provide authorized governmental services. Subsections 4 and 5 of § 39-3-112, Colo. Rev. Stat. (1973 & 1976 Cum. Supp.) (J.S. App. 37-38).

In 1976, the Jefferson County Tax Assessor notified Rockwell that it was the "user" of tax-exempt property (the Rocky Flats Plant) within the meaning of the Colorado statute, and was liable for the tax on such use. For 1976, the Assessor assigned a market value to the property of $200,787,951 and an assessed value of $61,263,380 (J.S. App. 3, 19). These figures were based on the following components (J.S. App. 3, 20):

	Market Value	Assessed Value
Land (350 Acres at $5,000 per acre)	$ 1,750,000	$ 552,000
Improvements	125,506,215	38,651,860
Machinery & Equipment	73,531,736	22,059,520
	$200,787,951	$61,263,380

Using the assessed values, Rockwell was assessed $4,632,246.69 for 1976 with respect to the Rocky Flats Plant (J.S. App. 3-4, 20). Pursuant to Contract 3533, to the extent that any such taxes are determined to be due from Rockwell, the United States is obligated to provide the funds for their payment as a "cost" to be borne by the United States (J.S. App. 4).

2. After the exhaustion of all administrative remedies (J.S. App. 20), the United States brought this action in the United States District Court for the District of Colorado, for a declaratory judgment that the Jefferson County tax on Rockwell was (i) in reality a tax on property owned by the United States, and (ii) a discriminatory tax against the United States and those with whom it dealt, and was therefore barred by the Supremacy Clause of the United States Constitution (J.S. App. 4, 27-28).

The district court determined that the Colorado statute, as it was sought to be applied, failed to segregate Rockwell's interest from that of the United States, and was therefore a tax on property owned by the United States. It observed that Rockwell was required to pay a tax which was almost double the amount of the total payment for its contract services. In the court's view, "[i]t [was] inconceivable that the value of an independent contractor's bene-

ficial use interest in Government property [could] be considered to be so much greater than the amount which the Government [was] willing to pay to that contractor" (J.S. App. 23). Accordingly, it determined that the tax infringed the immunity of the United States from the imposition of local taxes on governmental property under the Supremacy Clause of the United States. As a result, the court did not consider the government's alternative claim that the tax in question unquestionably discriminated against the United States and those with whom it dealt (J.S. App. 4-5, 20-28).

The court of appeals affirmed. It agreed that under this Court's decision in *United States* v. *County of Allegheny*, 322 U.S. 174, 185 (1944), the impact of the statute was "not to tax Rockwell's 'use' of government owned property but to lay an ad valorem general property tax on property owned by the United States" (J.S. App. 11). It therefore concluded that the tax was barred by the Supremacy Clause which immunizes the United States from the imposition of state and local taxes (J.S. App. 4-11, 31).

ARGUMENT

1. The courts below correctly held that the Colorado statute as applied in this case taxed the federal government's property and was thereby barred by the Supremacy Clause of the Constitution.

a. In *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court first expounded the principle that properties, functions, and instrumentalities of the federal government are immune from state taxation. "[U]nshaken, rarely questioned * * * is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of

express congressional consent are not subject to any form of state taxation." *United States* v. *County of Allegheny*, 322 U.S. 174, 177 (1944). See also *Department of Employment* v. *United States*, 385 U.S. 355, 358-359 (1966); *United States* v. *Tax Commission of Mississippi*, 421 U.S. 599, 612-613 (1975); *United States* v. *County of Fresno*, 429 U.S. 452, 459 (1977). Federal tax immunity is "the unavoidable consequence of that supremacy which the constitution has declared." *M'Culloch* v. *Maryland*, *supra*, 17 U.S. (4 Wheat.) at 436.

It is well established that a local tax may constitutionally be imposed upon the use by a private corporation of machinery and other property owned by the United States and leased to the private party for use in its business. *City of Detroit* v. *Murray Corp. of America*, 355 U.S. 489 (1958); *United States* v. *Township of Muskegon*, 355 U.S. 484 (1958); *United States* v. *County of Fresno*, 429 U.S. 452, 462 (1977). But it is equally clear that where a tax fails to identify, segregate and evaluate the private party's interest in the property owned by the federal government, and is based on a value exceeding the private party's interest in that property, the tax is on the federal government's property and violates the United States' immunity from local taxation. *United States* v. *County of Allegheny*, *supra*; *United States* v. *County of Fresno*, *supra*, 429 U.S. at 462-463 n.10.

As the court below recognized (J.S. App. 6), the key to determining whether a state tax has been impermissibly imposed on the federal government is "the relationship between Rockwell and the United States and the nature of the activity which the State of Colorado seeks to tax." Here, appellants made no effort to identify and separate Rockwell's interest (if any) in the Rocky Flats Plant, and to tax only

the value of that interest to Rockwell. Rather, they sought to tax the entire value of the plant and imposed a tax equal to almost twice the amount of Rockwell's fixed management fee. As a result, the tax was levied in at least substantial part upon the government's ownership interest in the plant (J.S. App. 6, 22-23). The imposition of the tax therefore infringed the government's immunity from state taxation under this Court's decisions in *County of Allegheny* and *County of Fresno*.

b. The details of the arrangement between Rockwell and the government confirm the correctness of the decision below. Rockwell's association with and use of the Rocky Flats Plant are controlled by Contract 3533. Rockwell is the instrument through which ERDA carries out its statutory responsibilities to produce nuclear weapons.[2] Rockwell renders managerial services to the United States for the purpose of operating the Rocky Flats Plant to the extent expressly specified by the United States, and functions under the direction and control of the United States. Rockwell has no lease, permit or license to the property in question, which is owned in fee simple by the United States (J.S. App. 6, 15-17). Rockwell brought in 12 of its senior management officials to run an operation employing 2,800 persons (R. 360).[3]

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[2] As this Court noted in *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232, 235 (1952), the original Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (and the successor Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919, under which the Rocky Flats Plant is operated) "adopt[ed] as the national policy the use of 'management contracts for the operation of Government-owned plants so as to gain the full advantage of the skill and experience of American industry.' "

[3] "R." refers to the original record on appeal in the court of appeals.

The principal function of the Rocky Flats Plant has always been the production of certain components for nuclear weapons. The essential ingredient used at Rocky Flats is plutonium, which is a "special nuclear material" as defined in Section 11 of the Atomic Energy Act of 1946 (42 U.S.C. 2014(aa)).[4] Plutonium used in the manufacture of nuclear components is owned by the United States. Indeed, the possession and use of plutonium for production of atomic weapons is permitted by law only in ERDA facilities operated in furtherance of ERDA's statutory responsibilities. No private firm can obtain a license to own, possess, use or transfer plutonium for the purpose of manufacturing and producing the nuclear components which are the products of the Rocky Flats Plant.[5] In short, federal law prohibits a firm such as Rockwell from acquiring a possessory interest in such an operation. Pursuant to Section 91 of the Atomic Energy Act of 1946 (42 U.S.C. 2121), the scope of the primary production activity carried on at the Rocky Flats Plant is subject to the express consent and direction of the President of the United States. It is only in accordance with such authorization that ERDA issues directions to Rockwell to manufacture products according to the speci-

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[4] The Atomic Energy Act of 1946, ch. 724, 60 Stat. 755, was amended in its entirety by the Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919. The Atomic Energy Act Sections cited are Sections of the 1946 Act as amended in 1954, and with later amendments incorporated at 42 U.S.C. 2011 *et seq.*

[5] Atomic Energy Act of 1946, Sections 91, 92, 110 (42 U.S.C. 2121, 2122, 2140); Energy Reorganization Act of 1974, Pub. L. No. 93-438, Section 202, 88 Stat. 1244 (42 U.S.C. 5842); Nuclear Regulations on Domestic Licensing of Special Nuclear Material, 10 C.F.R. 70.11, 70.32(a)(6); R. 358-359; J.S. App. 17-18.

fications and in the quantities prescribed. Any products not meeting such specifications are recycled or otherwise disposed of according to ERDA directions and at the government's expense, without any loss of fee or other penalty to Rockwell. During the period at issue, the plant has operated at no more than 28% of capacity (J.S. App. 18).

ERDA provides from the United States Treasury, through the letter-of-credit method of advanced funding, all of the funds necessary to sustain the operations of the Rocky Flats Plant under Contract 3533. No funds come from Rockwell (J.S. App. 16-17). In consideration for rendering management services under the contract, Rockwell is paid a fixed fee negotiated annually, which was $2,850,000 for the period July 1, 1975, through September 30, 1976, and $2,400,000 for the period October 1, 1976, through September 30, 1977 (J.S. App. 17).

It is therefore plain that Rockwell has no possessory interest in the Rocky Flats Plant that would be an occasion for the imposition of the Colorado ad valorem property tax. To the contrary, the performance of its management services under Contract 3533 requires that it have access to that Plant. Pursuant to that contract, Rockwell had no title or other legal interest in the plant that enabled it to use the facility for any enterprise it chose. On the contrary, Rockwell had access to the plant for the sole purpose of rendering managerial services to the United States. In this respect, Rockwell's relationship to the plant is not unlike the relationship that any government employee or agent has to a particular piece of machinery or equipment necessary for the performance of his official duties and unavailable for any personal use. In that case, the employee's or agent's interest in the machinery is solely as the means to earn his

wages or fee. Here, too, the Rocky Flats Plant serves as the mechanism by which Rockwell is obliged to perform managerial services pursuant to the contract. Such an interest, we submit, is not a proper subject of state ad valorem property taxation. Yet not only have appellants treated Rockwell as if it had some possessory interest in the Rocky Flats Plant for its own use. They have asserted a tax against Rockwell as if the interest of Rockwell in the Plant were coterminous with that of the United States. The decision below therefore properly held the tax to infringe the interest of the United States and therefore violate the Supremacy Clause.

c. At all events, even if Rockwell is deemed to have a possessory interest in the Plant that could constitutionally be taxed, appellants' failure to segregate that interest bars the tax under the Supremacy Clause. Indeed, the consequence of the County's failure to segregate whatever limited possessory interest in the Plant Rockwell might have is evidenced by the fact that the annual ad valorem tax for 1976 was $4.6 million while Rockwell's annual fee for that year fell within the range of $2.4 and $2.85 million. As the district court properly observed (J.S. App. 23):

> Here Rockwell is being called upon to pay a tax which is almost double the amount of the total payment for its contract services. It is inconceivable that the value of an independent contractor's beneficial use interest in Government property can be considered to be so much greater than the amount which the Government is willing to pay to that contractor. The fact that it is Rockwell's contractual right to pass on that burden to the Government does not save the conceptual incongruity of this tax.

Since the tax upon Rockwell is indisputably greater than its interest in the plant, it is plain, as the court of appeals concluded, that "[t]he 'substance of the present procedure is not to tax Rockwell's use' of government owned property, but to lay an ad valorem general property tax on property owned by the United States" (J.S. App. 11).

In urging affirmance, we do not suggest that a tax measured by the value of government-owned property may never be imposed on a private party who is using it. That argument was put to rest by *United States* v. *City of Detroit*, 355 U.S. 466 (1958), and its companion cases. See *City of Detroit* v. *Murray Corp. of America*, *supra*, 355 U.S. at 495 (Frankfurter, J., concurring and dissenting). Indeed, to the extent that *United States* v. *Allegheny County*, *supra*, so holds, it has been overruled by *City of Detroit*. See *United States* v. *County of Fresno*, *supra*, 429 U.S. at 462-463 n.10. But the decision below properly relied upon another aspect of *Allegheny County*, which survived *City of Detroit*, viz., that government property used by a private citizen may not be taxed at its full value where contractual restrictions on its use render the property less valuable to the user. There, as here, the contractor's right to use the property was strictly qualified by the contract. The Court therefore held invalid an ad valorem tax on the full value of the machinery. As the Court stated, in terms equally appropriate to this case, "Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide * * *. [T]he state has made no effort to segregate Mesta's interest [in the machinery] and tax it. The full value

of the property including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment" (322 U.S. at 186-187). Applying this principle, the Court in *United States* v. *County of Fresno*, *supra*, upheld a state possessory use tax upon government housing occupied by government employees where the assessments took account of government-imposed limitations on use.

2. Contrary to appellants' argument (J.S. 10-19), the decision below does not conflict with either *United States* v. *Township of Muskegon*, *supra*, or *United States* v. *Boyd*, 378 U.S. 39 (1964).

a. In *Township of Muskegon*, the United States allowed Continental Motors Corporation to use a government-owned plant to fulfill several government supply contracts that it was performing as a vendor. No rent was charged for the plant, and Continental agreed not to include any costs of operating the plant in the price of the products which it was selling to the United States. In exchange for the goods accepted by the government, Continental received a fixed fee. The Township of Muskegon assessed an annual ad valorem tax under a state statute that provided that when otherwise tax-exempt property was used by a private party in business conducted for profit, the private party was subject to taxation as though he owned the property. The tax assessed against Continental's interest in the federally owned facility was measured by the full value of the property.

The Court upheld that tax on the authority of its decision in the companion case of *United States* v. *City of Detroit*, *supra*. There, the Court observed that in enacting such a tax, the state legislature

attempted to equate the economic tax burden placed on a private enterprise using exempt property with a similar enterprise using taxable private property. The private owner would certainly pass the tax on to the user of the property. Thus, the full value of the tax-exempt property was a proper measure of the tax asserted against a user of tax exempt property (350 U.S. at 470, 473-474). In *Township of Muskegon*, the Court further observed that Continental was "acting as a private enterprise selling goods to the United States" and that "[i]t was free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them" (355 U.S. at 486).

To be sure, the Michigan statute upheld in *Township of Muskegon* closely resembles the Colorado statute at issue here. But the factual circumstances of this case are substantially different. Unlike Continental, Rockwell had no broad right to use the Rocky Flats Plant as it deemed convenient and advantageous in order to maximize its profits. Rockwell's managerial contract gave it no possessory interest in the property warranting the imposition of an ad valorem property tax. At the very least, Rockwell's possessory interest could not constitutionally be computed on the full value of the property. Hence, while the imposition of the tax upon the full value of the property was justifiable in *Township of Muskegon*, it was fatal in this case where Rockwell had access to the property solely for the purpose of performing its managerial services under the contract. In such circumstances, the Colorado assessor's failure to segregate whatever interest Rockwell might arguably have and tax only that interest means that the tax was

imposed in at least substantial part on the federal government's interest in the property and that the tax therefore violated the government's tax immunity under the Supremacy Clause. Moreover, it is highly unlikely that in the private sector an owner would pass on a property tax to a manager of its property. Thus, unlike the Michigan statute, the Colorado tax does not equate the economic burden upon Rockwell with that placed on any competitor in the private sector. Appellants' suggestion (J.S. 27-29) that a manager's interest in a governmental facility may be greater than what the government would be willing to pay the manager is, as the district court observed (J.S. App. 23), inconceivable.[6]

b. *United States* v. *Boyd*, *supra*, is likewise distinguishable. There, this Court sustained a "contractor's use tax" (378 U.S. at 40) on ordinary tangible personal property that an AEC management contractor had purchased on its own initiative for its use in performing its contract with the United States. That tax, which was imposed one time only on the purchase price or fair market value of the property used, at the sales and compensating use tax rate, was collected only when a sales tax on local purchases or a compensating use tax on out-of-state goods had not previously been collected in connection with that property. Here, by contrast, the Colorado tax is imposed annually on the full value of government-owned property without segregating the contractor's limited

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[6] Appellants' analogy to an owner's interest in real estate (J.S. 28-29) is misplaced. Admittedly, the profit an owner of property might make has no relationship to the value of the property. But it does not follow that a manager's interest in property can be divorced from what an owner is willing to pay the manager for management services when the manager has no other interest in the property.

rights to that property. Nothing in *Township of Muskegon* approves such a levy, which this Court more than 40 years ago characterized as in essence "an ad valorem general property tax on property owned by the United States." *United States* v. *County of Allegheny, supra*, 322 U.S. at 185.

Moreover, unlike the Colorado tax, the Tennessee tax at issue in *Boyd* was limited to the use of ordinary items of personalty, which had no unique governmental character and which would ordinarily be purchased, possessed, and ultimately consumed, by almost any contractor or manager in the course of normal business ventures. In contrast, the Colorado tax sought to be imposed here is not on goods acquired by Rockwell from third parties and used by Rockwell in performance under its contract with the United States. Rather, appellants seek to impose a tax on Rockwell measured by the value of the government-owned Rocky Flats Plant, to which Rockwell has access merely to perform managerial functions. But in performing its management functions, Rockwell was not permitted to act with respect to the plant as an owner, lessee, or bailee with unrestricted rights of possession.[7]

3. Even if the Colorado tax were regarded as imposed only on Rockwell's use of government-owned

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[7] Contrary to appellants' suggestion (J.S. 27), *United States* v. *New Mexico*, 624 F.2d 111 (10th Cir. 1980), petition for cert. pending, No. 80-702 (J.S. 27), does not bear upon the question presented here. That case involves the application of a gross receipts and compensating use tax on items purchased by the contractor, and on funds disbursed by it under the advance funding procedure. Resolution of the immunity issue in *New Mexico* turns upon whether the contractor is, in those transactions, acting as an agent of the government.

property, and not on the government-owned property itself, the tax is nevertheless unconstitutional because it discriminates against the federal government and those persons with whom it deals. Apart from the fundamental rule that the federal government is immune from state taxation, it is equally well settled that a state may not discriminate against the federal government and those with whom it deals. See, *e.g.*, *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376, 385-387 (1960); *Moses Lake Homes, Inc.* v. *Grant County*, 365 U.S. 744, 751 (1961); *United States* v. *County of Fresno*, *supra*, 429 U.S. at 460, 462. As this Court stated in *United States* v. *City of Detroit*, *supra*, 355 U.S. at 473, "[i]t still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals."

Because the courts below found that the tax assessed against Rockwell was in substance an impermissible tax on property of the United States, they did not reach the issue whether the tax was discriminatory—an issue raised in both courts below (J.S. App. 28; appellee's brief in the court of appeals, at 42-44). But, as the prevailing party, we may, of course, raise the discrimination argument in support of the judgment. *Fusari* v. *Steinberg*, 419 U.S. 379, 387-388 n.13 (1975); *Dandridge* v. *Williams*, 397 U.S. 471, 475-576 n.6 (1970).

The Colorado tax at issue here is discriminatory in several respects. It does not apply to any use or management of property owned by a county or other local government (1) if the property was subject to payments in lieu of taxes (§ 39-3-112.(4)(a) (J.S. App. 37)), or (2) if the property was, before July

1, 1976, leased, loaned, or otherwise made available to and used by a private person or corporation in connection with a business conducted for profit (§ 39-3-112.(4)(b) (J.S. App. 37-38)). Further, the tax does not apply to any use or management of property owned by any political subdivision of the state which is "used in the provision of normal facilities, services, or operations authorized by constitution or statute to be provided by such political subdivisions" (§ 39-3-112.4(d) (J.S. App. 38)).

A tax that treats local governments and the federal government differently is discriminatory and unconstitutional. *United States* v. *Clayton*, 250 F. Supp. 827 (E.D. N.C. 1965), appeal dismissed, 384 U.S. 154 (1966); *Knapp-Stiles, Inc.* v. *Michigan Department of Revenue*, 370 Mich. 629, 639-640, 122 N.W.2d 642, 647 (1963). Cf. *Chrysler Corp.* v. *Township of Sterling*, 410 F.2d 62 (6th Cir. 1968). As the court in *Clayton* said (250 F. Supp. at 830-831), in paraphrasing this Court's holding in *Phillips Chemical Co.*, "it does not seem too much to require that a state treat the federal government as well as it treats itself or its political subdivisions."

Here, Colorado would not impose a tax upon a manager of property owned by a political subdivision, if that property were used for governmental purposes. Yet it attempts to impose a tax upon a manager of the federal government's property used to carry out unique governmental functions dealing with nuclear arms. Moreover, if the same party had concluded a management contract with a local government prior to July 1, 1976, it would not be required to pay the tax. Yet Rockwell, which entered its management contract with the federal government before that date, is required to pay the tax. In addition, if ERDA were to make a payment in lieu of taxes—as

it is empowered to do by Section 168 of the Atomic Energy Act, 42 U.S.C. 2208 (although the record does not indicate that any such payments have been made), its management contractor would have to pay a tax. The manager of a local government's property, however, would not be subject to tax in similar circumstances. Finally, the Colorado tax exempts agricultural users of otherwise tax-exempt land (§ 39-3-112.(5) (J.S. App. 38)), and the recreational users of tax-exempt land are taxed on a percentage of the rental payments for the land, not on the value of the land (§ 39-3-112.(6) (J.S. App. 38)).

In sum, Rockwell, as manager of the Rocky Flats Plant, bears a more onerous tax burden than is imposed on managers of property owned by Colorado political subdivisions, on property used for agricultural purposes, or on property used for recreational purposes. The tax is thus discriminatory against the United States and those with whom it deals, and is therefore invalid.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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